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No. 81-2390 and No. 82-356

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

METROPOLITAN EDISON CO., *et al.*, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and
THE UNITED STATES OF AMERICA, *Petitioners*,

v.

PEOPLE AGAINST NUCLEAR ENERGY, *et al.*, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, in addition to the Nuclear Regulatory Commission's consideration and evaluation of the environmental impacts of the actual operation of a nuclear power plant, the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), requires the Commission to consider and predict impacts on the psychological health of area residents that may result from their fears concerning the operation of that plant.

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METROPOLITAN EDISON CO., *et al.*,
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v.

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Respondents.

BRIEF *AMICUS CURIAE* OF EDISON ELECTRIC INSTITUTE IN SUPPORT OF PETITIONERS

Edison Electric Institute ("EEI") hereby submits its brief *amicus curiae* in support of petitions for a writ of certiorari filed by Metropolitan Edison Company, Jersey Central Power & Light Company and Pennsylvania Electric Company ("Utility Petition") on July 1, 1982, and the United States and the United States Nuclear Regulatory Commission ("Government Petition") on August 30,

1982.[1] Petitioners seek the United States Supreme Court's ("the Court") review of a decision by the United States Court of Appeals for the District of Columbia Circuit ("Court of Appeals") that Section 102(2)(C) of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332(2)(C) (1976), requires the Nuclear Regulatory Commission ("NRC"), in addition to its consideration and evaluation of the environmental impacts of the actual operation of a nuclear power plant, to consider "the potential psychological health effects" of its proposed action on area residents resulting from their fears concerning the operation of that plant. *People Against Nuclear Energy* v. *Nuclear Regulatory Commission*, 678 F.2d 222, 235 (D.C. Cir. 1982)[2] ("*PANE*").

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members serve 99.6 percent of all customers of the investor-owned segment of the utility industry and 77 percent of the nation's electricity users. This case concerns matters of considerable importance to EEI's members who now or may in the future hold licenses and permits issued by federal agencies and are or will be subject to federal regulatory control.

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[1] EEI has obtained the written consent of all parties to this case to the filing of this brief. The written consents have been filed with the Clerk of this Court.

[2] Judge Wright, joined by Judge McGowan, constituted the majority on the NEPA issue. Judge Wilkey dissented on this issue. Since petitioners seek review only of the NEPA issue, we will refer to Judge Wright's opinion on the NEPA issue as the majority and to Judge Wilkey's opinion as the dissent.

The decision by the Court of Appeals in *PANE* holds that psychological health issues are cognizable under Section 102(2)(C) of NEPA. This will mean that federal agencies must predict the psychological impacts of their actions and, when such impacts are significant, analyze them in an environmental impact statement ("EIS").

This decision directly affects all those nuclear utilities which are regulated by the NRC. EEI member companies currently operate 69 of the nation's 80 nuclear power plants licensed to operate by the NRC, and expect to operate an additional 61 units now under construction or in planning.[3] Psychological health issues have been introduced in at least seven proceedings before the NRC, each of which involves an investor-owned electric utility member or members of EEI. Utility Pet. at 9 n.11. These and other EEI members with nuclear operations have a direct interest in this case.

The effect of the Court of Appeals' decision, however, is not limited just to EEI members with an interest in nuclear power. Virtually every electric generation facility is subject to federal regulatory control through permitting or licensing activities which are likely to trigger the requirements of NEPA, regardless of the energy source of the facility. In addition to the licensing of nuclear power plants, NEPA is applied to the licensing of hydroelectric facilities by the Federal Energy Regulatory Commission and the issuance of federal permits necessary for the operation of coal-powered plants. The

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[3] U.S. Nuclear Regulatory Commission, *Facilities License Application Record*, NUREG-0652, Vol. 1, No. 3 (February 1982) (updated through September 7, 1982). As of March 31, 1982, there were a total of 156 reactor units in a planning, construction or operating stage. Energy Information Administration, U.S. Department of Energy, *Quarterly Report: Energy Information* 39 (July 2, 1982).

construction of transmission lines through federal lands, streams, swamps or other wetlands also requires federal approvals and permits which may trigger the requirements of NEPA. Other activities necessary for the efficient operation of electric utility facilities, such as the transportation of nuclear fuel or nuclear waste, similarly require federal approvals and determinations which may trigger the provisions of NEPA. By requiring consideration of psychological health issues under NEPA, the Court of Appeals' decision expands the factors to be analyzed in the decision-making process applicable to significant aspects of electric utility operations.

As a national association, EEI is in a position to represent a broad spectrum of interest and impact arising from the decision below. This brief *amicus curiae* discusses from a national perspective the extent of the impact of the Court of Appeals' decision on the federal government and private industry and demonstrates that the decision improperly expands the procedural requirements of NEPA in contravention of the statutory language and relevant judicial decisions.[4]

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[4] In addition to the issue presented, EEI shares the view of the Government Petitioners (Gov. Pet. at 17-18 n. 12) that the Court of Appeals, while not compelled to do so under the facts of this case, has reached far beyond NEPA and apposite court decisions by stating that the NRC's continuing regulatory responsibility over licensed nuclear plants is a "Federal action" under Section 102(2)(C) of NEPA. 678 F.2d at 231-232. Thus, the majority would require, even in the absence of a proposed action, that the NRC continually analyze changed conditions and new information to determine their threshold significance and, where such significance is found, embark on the full

SUMMARY OF ARGUMENT

The prevailing view of the federal courts has been that Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), does not require federal agencies to consider or predict the psychological health impacts that may result from the public's fears concerning a proposed federal action. Judge Wilkey's dissent notes two bases for these holdings. 678 F.2d at 240. Psychological concerns are too far removed from the underlying purpose of NEPA, which is to ensure that an agency considers the environmental impacts of a proposed action, not the reactions of potentially affected individuals to the risk of those environmental impacts. In

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EIS process. As Judge Wilkey observed, "[t]his is a holding of considerable breadth." 678 F.2d at 244.

We agree with the Government and Utility Petitioners that the position of the court below is erroneous. Gov. Pet. at 17-18 n.12; Utility Pet. at 7 n.10. This position conflicts with prior decisions of this Court which have confirmed that the trigger for Section 102(2)(C) of NEPA is a specific proposal for a major federal action having a significant environmental impact, such as to approve, disapprove, amend or otherwise change a program or project. *Aberdeen & Rockfish R.R. Co.* v. *SCRAP*, 422 U.S. 289, 320 (1975) ("*SCRAP II*"); *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401-402 & nn.12-13 (1976); *Weinberger* v. *Catholic Action of Hawaii*, ___ U.S. ___, 102 S. Ct. 197, 203 (1981). For example, in *SCRAP II* this Court held that an EIS is not required until an agency "makes a recommendation or report on a *proposal* for federal action." 422 U.S. at 320 (emphasis in original). In the absence of a proposed action, an agency's responsibility under Section 102(2)(C) of NEPA is nil.

The position of the Court of Appeals, if not disaffirmed by this Court, is likely to be cited in innumerable proceedings before federal agencies and the courts. Therefore, we urge that this Court make clear that, in the absence of a proposal for action by the agency, Section 102(2)(C) of NEPA does not impose any obligation upon a federal agency.

addition, the cases recognize the inherent difficulties in attempting to measure and incorporate into an environmental analysis the widely varying psychological states of potentially affected persons. These decisions have held that to require federal agencies to predict psychological impacts which might be caused by a proposed federal action would mandate an unreasonable and meaningless inquiry. This violates the rule of reason under NEPA established in *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972) and endorsed by this Court in *New York* v. *Kleppe*, 429 U.S. 1307, 1311 & n.1 (1976).

The majority opinion never confronts the difficulty which will be faced by federal agencies in attempting to predict the psychological reactions of a heterogeneous population to a future event. There is a world of difference between conducting a *post-hoc* analysis of the psychological impacts of a previous action and predicting the psychological impacts which may occur in the future if an action were taken. However, the majority opinion ignores this crucial distinction in discussing whether predictions of psychological impacts are sufficiently quantifiable. 678 F.2d at 228-229. Indeed, the majority opinion misstates the finding of the Atomic Safety and Licensing Board on this subject. The Board could not identify a source of evidence which would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an environmental impact statement. *In the Matter of Metropolitan Edison Company*, 11 NRC 297, 305 (1980). Furthermore, the Court of Appeals identified no authority showing that such predictions would be meaningful.

Essentially, the predictions required by the Court of Appeals' decision would be little more than a popularity

poll. NEPA should not be construed to require this result. With respect to this case, the use of nuclear power to further national energy goals is a policy decision which, as this Court has acknowledged, Congress has already made. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 557-558 (1978).

If not reversed, the majority opinion will have a far-reaching impact, since, as Judge Wilkey points out, if NEPA embraces fears and anxieties in one case, it must in all. 678 F.2d at 241. Indeed, since virtually all federal agencies must comply with NEPA, allegations involving psychological health impacts would have to be addressed throughout the federal government. Even if the majority opinion is construed narrowly, considerable litigation is likely on whether particular allegations of fear anxiety and distress would be cognizable under NEPA. In all of these cases, agencies, parties and the courts will be compelled to focus upon the public's fears and anxieties concerning the environmental risks associated with the proposed federal actions, not the risks themselves. This would be an unnecessary and extravagant exercise, for nothing in NEPA even suggests a departure from the holdings of prior decisions that psychological health impacts are not cognizable under the statute.

ARGUMENT

The Court Of Appeals' Decision With Respect To Psychological Health Violates The Rule Of Reason Consistently Applied To NEPA And Is Inconsistent With Prevailing Judicial Decisions.

Ever since the landmark decision in *Natural Resources Defense Council* v. *Morton*, 458 F.2d 827, 834, 837 (D.C. Cir. 1972), courts have consistently applied a rule of reason in construing a federal agency's responsibilities under Section 102(2)(C) of NEPA. *New York* v. *Kleppe*,

429 U.S. 1307, 1311 & n.1 (1976). *NRDC* v. *Morton* explained the rationale for this approach, stating:

> The statute [NEPA] must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious that the resources of energy and research—and time—available to meet the Nation's needs are not infinite.

458 F.2d at 837.

The prevailing view of the courts has been that NEPA does not require federal agencies to predict the psychological impacts that might result from a proposed action.[5] Judge Wilkey's dissent correctly acknowledges two important bases for these holdings:

> They are based largely on the fact that psychological concerns are simply too far removed from the purpose of NEPA, which is to ensure that an agency considers the environmental effects of a decision, not the reactions of affected individuals to the risk of those environmental effects. They also rest on the inherent difficulties in attempting to measure and incorporate into the environmental analysis the differing psychological states of the affected persons.

678 F.2d at 240.

These cases essentially have found that to require agencies to predict psychological impacts which might be caused by a proposed action would mandate an unreasonable and meaningless inquiry. This violates the rule of reason. In *Hanly* v. *Kleindienst*, 471 F.2d 823, 833 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973), for example,

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[5] Relevant decisions which have addressed this issue are discussed by Utility Petitioners (Utility Pet. at 11-14 & n.13) and in Judge Wilkey's dissent (678 F.2d at 239-240 & nn.19-21).

the court expressed doubt that psychological impacts on neighbors of a proposed jail were required to be considered under NEPA "since they do not lend themselves to measurement." The court identified a fundamental distinction between environmental impacts that are susceptible to some form of measurement and psychological factors:

> Unlike factors such as noise, which can be related to decibels and units which measure duration, or crime, in which crime statistics are available, psychological factors are not readily translatable into concrete measuring rods.

Id. at 833 n.10. Judge Leventhal quoted this language with approval in *Maryland-National Capital Park & Planning Comm'n* v. *United States Postal Service*, 487 F.2d 1029, 1038 (D.C. Cir. 1973) and, as Judge Wilkey's dissent notes, subsequently observed that:

> although measurement difficulties do not necessarily prevent consideration under NEPA, they do 'have a bearing on the intention of Congress, and whether it contemplated . . . a requirement of a detailed [EIS].'

678 F.2d at 240.

Although these cases require agencies to discuss the impact of a proposed action on the crime rate, which can be quantified, the same cases hold that NEPA does not require agencies to predict the psychological impact of *fears* about crime. *Hanly*, *supra*, 471 F.2d at 833 & n.10; *Nucleus of Chicago Homeowners Ass'n* v. *Lynn*, 524 F.2d 225, 231 (7th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Como-Falco Coalition* v. *Dep't of Labor*, 465 F. Supp. 850, 861-862 (D. Minn. 1978), *aff'd*, 609 F.2d 342 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980); *Trinity Episcopal School Corp.* v. *Romney*, 387 F.Supp. 1044, 1078-1079 (S.D.N.Y. 1974), *rev'd and remanded in part*

on other grounds, 523 F.2d 88 (2d Cir. 1975). The holdings of these cases are clear and uniform. NEPA does not require agencies to predict the level and impact of fears and anxieties *per se*.

The majority opinion's attempt to distinguish these cases by characterizing them as involving "socioeconomic anxieties" (678 F.2d at 229) is unpersuasive. These cases specifically refer to psychological effects, fears and sensibilities. The majority opinion frames this case in the same terms of fear and anxiety when it states that NEPA applies to "post-traumatic *anxieties*, accompanied by physical effects and caused by *fears* of recurring catastrophe." 678 F.2d at 230 (emphasis added). However, the majority fails to articulate any controlling distinction for purposes of NEPA between these other cases and the present case. A fear of personal harm triggered by a personal assault or other traumatic event should be indistinguishable from the type of psychological health impact alleged to arise under the facts of this case. We agree with Judge Wilkey. "*In each case . . . what we are dealing with are fears and anxieties; if NEPA embraces fears and anxieties in one, it must in all.*" 678 F.2d at 241 (emphasis in original).

The majority's attempt to limit the scope of its holding is equally unpersuasive. On the one hand, with respect to the applicability of NEPA to psychological health impacts, the majority appears to establish a three-part test which requires post-traumatic anxieties, physical effects and fears of recurring catastrophe. 678 F.2d at 230. On the other hand, it departs from this test when it states that NEPA applies to "medically diagnosed effects of traumatic accidents on the human mind." *Id.* at 230 n.10. The reference to trauma is the only common factor in these formulations. We agree with Judge Wilkey, how-

ever, that a prior traumatic event is not a valid criterion for determining the applicability of NEPA. 678 F.2d at 243. Serious psychological impacts surely can occur without the stimulus of a traumatic event. *Id.*

Essentially, the holding is this case appears to be distinguished from earlier cases only by the majority's concerns about nuclear power and its subjective determination as to which fears and anxieties are "worthy" of consideration under NEPA. 678 F.2d at 241-243 & n.36 (Wilkey, J., dissenting.) Such an approach is clearly erroneous. In interpreting an agency's obligations under NEPA, the Court of Appeals may not impose its views on the desirability of any specific federal policy.

Moreover, the majority opinion never confronts the difficulty of federal agencies complying with the obligation it imposes. Nor does the majority fully acknowledge the distinction between analyzing the impact of the accident at TMI-2 on a *retrospective* basis and *predicting* the impact of the restart of TMI-1. While the majority opinion seems to focus on the importance of analyzing the psychological impact of the TMI-2 accident (678 F.2d at 227, 228, 230), it imposes upon the NRC a far different and more difficult obligation—that of predicting the psychological reaction of a heterogeneous population to a future event. There is a substantial difference between conducting an after-the-fact analysis of the psychological health impacts of a prior action and attempting to predict the psychological health impacts which might occur in the future if a certain action were taken. The majority opinion cites no scientific basis or authority for saying such predictions could be made in a meaningful way, and we are aware of none.

The majority opinion obliterates this crucial distinction in discussing whether predictions of psychological factors

are sufficiently quantifiable. 678 F.2d at 228-229. Its attribution to the Atomic Safety and Licensing Board of an assertion that "psychological factors were sufficiently quantifiable to be considered" simply ignores the context of that statement, which refers to retrospective studies of impacts resulting from the TMI-2 accident. *Id.* at 229. With respect to future psychological health predictions the Board in fact found otherwise:

> We have examined the filings of the parties, the studies referred to by the staff, and other literature. *We cannot identify a source of evidence which would permit the measurement of the psychological stress phenomenon well enough for use in a full-scale cost/benefit balancing in an EIS.* Nor do we know whether or not the state of the art can now produce such evidence.

In the Matter of Metropolitan Edison Company, 11 NRC 297, 305 (1980) (footnote omitted) (emphasis added).

EEI submits that the prospective measurement of the psychological impacts of a proposed action is inherently subjective and not meaningful for the following reasons. The manner in which individuals perceive events and surroundings is due in large part to the forces which shaped their individual psychological make-up from early childhood, as well as to daily events, such as problems at home or work. Even if individuals predict what their reactions to a future event would be, their actual reactions to that event could be far different from that which they anticipated. Predictions of individual reactions to a future action are also likely to be influenced by many outside factors. The actions of federal agencies and other interested parties could be significant in this regard. The very fact of a federal agency conducting a thorough inquiry into the psychological health impacts of an action on a

population could heighten the stress levels in that population. Groups opposed to proposed actions would have little incentive to focus public debate on facts concerning the safety of the proposal and substantial incentive to stir up public fears and emotions. Political controversy and media attention could also influence public reaction. Distinguishing between predicted impacts caused by the proposal itself and the impacts caused by these other factors would be virtually impossible.

Under these circumstances, any prediction of future psychological impacts of a proposed action is likely to be little more than a poll of the relative degrees of approval of and antagonism towards the action. In this particular case, NEPA should not be construed to require the NRC to sponsor such a popularity poll on the use of nuclear power. This is a policy decision properly within the domain of the Congress, and Congress has made the decision to use nuclear power to help satisfy our nation's energy needs. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 557-558 (1978). Nor should NEPA be construed to require a poll of the public's confidence in the ability and reliability of an agency's regulatory role, such as the NRC in this case. Any concerns about the impacts of proposed actions should be addressed directly under NEPA through an analysis of the factors which cause those concerns, rather than indirectly through an analysis of the public's perceptions. Such perceptions are extremely subjective and impossible to distinguish from the anxieties arising from the "social opinions, economic concerns, or political disagreements" which the majority opinion recognizes are not cognizable under NEPA. 678 F.2d at 230.

The majority opinion would have a far reaching impact if it is not reversed. Judge Wilkey predicts this is a

necessary result, reasoning, *"if NEPA embraces fears and anxieties in one [case], it must in all."* 678 F.2d at 241 (emphasis in original). Since NEPA applies to virtually all federal agencies, considerations of psychological health issues would have to be addressed throughout the federal government and would be subject to challenge.[6] *Id.* at 239 n.17.

Even under the most narrow reading of the majority opinion, constant litigation is likely as to whether specific allegations of fear, anxiety or distress are based upon sociological or economic factors which would not be cognizable (678 F.2d at 229), or involve severe and medically diagnosable effects (*id.* at 230 & n.10).[7] Even a narrow construction requiring a prior traumatic event could still affect a broad range of activities. A traumatic event could be caused, for instance, by criminal acts, natural phenomena or disasters involving airports, highways, dams, mines, liquefied natural gas facilities, transportation of hazardous materials, storage of hazardous wastes, missile sites, submarine bases and other defense facilities. Opponents of such activities could rely upon the majority opinion to seek to obtain under NEPA an analysis of the psychological health impacts of federal actions involving

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[6] Psychological health claims have been introduced in at least seven proceedings before the NRC. Utility Pet. at 9 n.11.

[7] On July 16, 1982, the NRC issued a policy statement on the treatment of psychological stress claims in proceedings other than TMI-1. 47 *Fed. Reg.* 31762 (1982). This statement interprets the majority opinion narrowly and effectively precludes consideration of psychological stress claims in all other proceedings. We agree with the reasoning of the Government Petition (at 27-28 n.22) that, despite this policy statement, the issue of the cognizability of psychological stress contentions in other proceedings is likely to be litigated in the Courts of Appeals.

such activities. Many such proposals are likely to be involved in lengthy litigation questioning whether the alleged psychological impacts satisfy the majority's criteria for cognizability under NEPA.

In all of these cases, parties, agencies and the courts will be focusing upon the public's fears and anxieties stemming from their perceptions of the risks associated with the proposed actions rather than with the risks themselves. We submit that this is poor public policy and that nothing in NEPA even suggests, much less requires, a departure from the holdings of the earlier cases that psychological impacts are not cognizable under NEPA.

CONCLUSION

For the foregoing reasons, *amicus curiae* Edison Electric Institute respectfully urges that the petitions for a writ of certiorari be granted.

Respectfully submitted,

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